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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

Nos. 280, 314 and 966

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280 ROSCO JONES, *Petitioner*,
v.
CITY OF OPELIKA, *Respondent*
ON WRIT OF CERTIORARI TO
SUPREME COURT OF STATE OF ALABAMA.

■

314 LOIS BOWDEN and ZADA SANDERS, *Petitioners*,
v.
CITY OF FORT SMITH, *Respondent*
ON WRIT OF CERTIORARI TO SUPREME COURT OF
STATE OF ARKANSAS.

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966 CHARLES JOBIN, *Appellant*,
v.
THE STATE OF ARIZONA, *Appellee*
APPEAL FROM SUPREME COURT OF STATE OF ARIZONA.

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ADDITIONAL SUGGESTIONS and AUTHORITIES supporting Petitioners' MOTION FOR REHEARING

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MAY IT PLEASE THE COURT:

Issues raised for the first time in the majority opinion and answered in the motion for rehearing need additional discussion so as to call to the attention of this honorable court new matter, authorities and for-

mer decisions of this court not included in the motion.

The holding of the court that the amount of taxes imposed on freedoms of press and worship should be attacked as excessive needs additional discussion by the Court, in view of former decisions here brought to the attention of the Court. The Court says that it is only the *amount* of the tax which can be complained of by claiming it is *excessive* and that if no complaint is made the complaint against the levying of the tax in any amount cannot be sustained because the taxes here imposed are constitutional and within the taxing power of the state.

It has always been the holding of this Court that when it is found that the tax is proper and constitutional such tax cannot be upset as a "substantial clog" or *excessive* by the judiciary, state or federal, including this Court.

On the contrary, however, when there is absence of any power for either the national or a state legislative body to accomplish by legislative device, such as taxation, that which causes an invincible, irreconcilable and indubitable repugnancy between the statute (or ordinance) and the constitutionally shielded inherent *fundamental personal right*, the judicial corrective has been, can and ought, under the mandate of the Constitution, to be applied.

The statement by the majority opinion on this matter to the effect that amount of taxes can be questioned, without consideration or discussion of prior decisions of this Court, leaves the petitioners and all persons similarly situated in a dilemma of the worst kind.

In *Veazie Bank* v. *Fenno*, 8 Wall. 533, the validity of a tax law which increased a tax on the circulating notes of persons and state banks from 1 per centum to 10 per centum was in question. It was insisted that the tax was excessive, so excessive as to indicate a purpose of Con-

gress to destroy the franchise of a bank, etc. On page 548 this Court said:

> "The first answer to this is that the judiciary cannot prescribe to the legislative departments of the government limitations upon its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

In the "Child Labor Tax Case", 259 U. S. 20, this Court reviews the above and other cases and, speaking through Chief Justice Taft, says:

> "It will be observed that the sole objection to the tax there was its excessive character. Nothing else appeared on the face of the act. It was an increase of a tax admittedly legal to a higher rate and that was all [p. 41] . . . "

McCray v. *United States,* 195 U.S. 27, like the *Veazie Bank* case, supra, involved the increase of an excise tax upon a subject properly taxable in which the tax payer claimed that the tax had become invalid because the increase was excessive, i. e., a "substantial clog". It was a tax on oleomargarine, a substitute for butter. The tax on white oleomargarine was one quarter of a cent a pound, and on the yellow oleomargarine was first two cents and then by the act in question increased to ten cents per pound. This Court held that the discretion of Congress in the exercise of its constitutional powers to levy excise taxes could not be controlled or

limited by the courts because the latter might deem the incidence of the tax oppressive or even destructive. There the Court said:

> "The proposition that where a tax is imposed which is within the grant of powers, and which does not conflict with any express constitutional limitation, the courts may hold the tax to be void because it is deemed that the tax is too high, is absolutely disposed of by the opinions in the cases hitherto cited, and which expressly hold, to repeat again the language of one of the cases (*Spencer* v. *Merchant* [125 U. S. 345]), that 'The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers.' The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

But, under constitutional mandate, when constitutional limits are overstepped by lawmaking or executive agencies, the judicial department must, can and did refuse to permit legislation passed in the exercise of the strongest power of the *federal* government, the power to tax.[2]

A fortiori, the ultimate judicial corrective is appliable with propriety when fundamental federal-citizen rights shielded by the First and Fourteenth Amendments against state encroachment are abridged (1) by enforcement of legislation unconstitutional *on its face,*[3] or (2) by *misapplication,* as here, and/or

[1] *Baily* v. *Drexel* ("Child Labor Tax Case"), 259 U. S. 20 (1922).

[2] Cf. *Busey* v. *Dist. of Columbia,* petition for writ of certiorari pending in this Court, No. 235 Oct. Term 1942.

[3] *Lovell* v. *Griffin,* 303 U. S. 444.

misconstruction of legislation that is in fact constitutional and proper.[4]

The case of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, involved the validity of a license tax levied on the doing of business by all corporations, joint stock companies, associations organized for profit having a capital stock represented by shares, and insurance companies. The excise or license tax was measured by the net income of the corporation. There was not in that case the slightest doubt that the tax was a tax, and a tax for revenue, but it was attacked on the ground that such a tax could be made excessive and thus used by Congress to destroy the existence of state corporations. To this the Court gave the same answer as in the *Veazie Bank* and *McCray* cases.

In the "Child Labor Tax Case", supra, the following language seems appropriately descriptive of the majority opinion in the case at bar, to wit, "To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states." In the majority opinion here the rights of freedom of press and of worship are 'completely wiped out'. We quote further from Chief Justice Taft: "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards."

If this Court takes the position that the amount required here is a "regulatory fee", then we say that

[4] Cf. *Minersville Dist.* v. *Gobitis*, 310 U. S. 586, where constitutionality of a state statute *as construed and applied* was dealt with only in the dissenting opinion of STONE, J., the unhappy decision based upon the majority opinion being happily confined to *prima facie* constitutionality of the statute.

the *tax* is clearly within that condemned in the "Child Labor Tax Case" because it immediately becomes a *penalty* imposed upon the exercise of constitutional rights. It should be kept in mind that the laws here are admittedly NOT regulatory but purely revenue measures as shown on their faces or stipulated by the parties. One paying the tax can go anywhere at any time and carry on his "licensed" business without interference from the licensing authority, except in the City of Opelika, where the censorial *uncontrolled* right to revoke a license is retained by the ordinance.

In discussing the question presented on page 10 of the majority (slip) opinion in the *Jones* v. *Opelika* case the Court says that *taxation* is not interdicted by the Constitution as an abridgment of freedoms of worship and press. Then the Court cites the case of *Grosjean* v. *American Press Co.*, 297 U. S. 233, just following such statement. It is to be noticed that in the *Grosjean* case this Court knocked down a LICENSE TAX imposed without requiring the newspaper to contend and without holding that the amount was excessive. The *Grosjean* case is so nearly in point to this that, in view of the fact that this Court fails to discuss that opinion, we desire to call certain quotations from same to the attention of the Court *now*. In the *Grosjean* case this Court said:

> "The tax imposed is designated a 'license tax for the privilege of engaging in such business', that is to say the business of selling, or making any charge for [commercial] advertising. . . . The framers of the First Amendment were familiar with the English struggle, which then had continued for nearly eighty years, at the end of which time it culminated in a lasting abandonment of the obnoxious taxes. The framers were likewise familiar with

the then recent Massachusetts episode; and while that occurrence did much to bring about the adoption of the amendment (see *Pennsylvania and the Federal Constitution*, 1888, p. 181), the predominant influence must have come from the English experience. It is impossible to concede that by the words 'freedom of the press' the framers of the amendment intended to adopt merely the narrow view then reflected by the law of England that such freedom consisted only in immunity from previous censorship; for this abuse had then permanently disappeared from English practice. It is equally impossible to believe that it was not intended to bring within the reach of these words such modes of restraint as were embodied in the *two forms* of *taxation* already described. . . . In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting *any form of previous restraint upon printed* publications, or their *circulation*, including that which had theretofore been effected by these two well known and odious methods.

"This Court had occasion in *Near* v. *Minnesota*, supra, . . . and the Court was careful *not* to limit the protection of the right to any particular way of abridging it. . . .

"Judge Cooley has laid down the test to be applied—'The evils to be prevented were not the censorship of the press merely, but *any action* of the government by means of which it might prevent

such *free* and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.' " [Italics added] 2 Cooley's *Constitutional Limitations*, 8th ed., p. 886.

In further proof of the immediate *bad effects* of the June 8 decision in this case, in addition to those mentioned in the motion, it seems fitting to call attention to the fact that on June 9, 1942, an aged couple, R. J. Adair and wife, Jehovah's witnesses, were arrested in Caruthersville, Missouri, under a local license-tax law. The local city attorney *engineered* the arrests on basis of an Associated Press news dispatch of the decision in this case. At their trial in the Municipal Court the two could not obtain counsel because of hatred worked up among the local populace by the city attorney. They represented themselves and urged that the ordinance did not apply to them because ordained ministers distributing books were exempted from the terms of such ordinances by statute of the state. (See Section 14608, Missouri Revised Statutes; *Trenton* v. *Clayton*, 50 Mo. App. 536, 539-540.) Such case and statute specifically exempted defendants. The trial was attended by a large crowd of mobsters, friends of the city attorney. Immediately the defendants were committed to jail after being tried, convicted and denied bail or the right of appeal on basis of the city attorney's argument that it was 'unnecessary since the United States Supreme Court had disposed of the question on June 8, 1942' in the *Jones* v. *Opelika* case. Their two friends offered, in open court, to take an appeal and to make cash or property bond. In full view of the judge, city attorney and law-enforcing officers the angry mob attending the trial viciously assaulted those friends while attempting to perfect the appeals for defendants,

beating them until blood poured out of their bodies beyond endurance, and inflicted serious and permanent bodily injury and damage with iron instruments, fists and shoes of kicking feet until victims almost died. They were driven out of town and denied medical treatment and the right of helping to perfect said appeals on the day of the trials. Under the law of Missouri the appeal must be taken on the day of trial in such cases. Attorneys in an adjoining county were employed to secure their release. The mob, with the consent of the local officials, threatened those attorneys with death if they attempted to do anything in their behalf or attempted to secure release of the defendants. After many days of fruitless effort and local opposition to legal process the attorneys abandoned the case. On August 28, 1942, after being in jail for *seventy-eight* (78) days (of a 121-day sentence assessed against each), undergoing much suffering and living in unhealthy surroundings, these two ordained ministers of the gospel were released by order of Missouri Supreme Court obtained by still other counsel on application for writ of habeas corpus.

This is cited to show how eager and prompt are law-enforcing *officials* and mobsters in some communities to follow decisions of this Court only when such are adverse to Jehovah's witnesses.

We submit that the motion for rehearing should be granted.

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